

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

## Development and Current Situation of the Constitutional Adjudication in Korea<sup>\*</sup>

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### Abstract

After having gone through the inactive and sometimes merely ornamental forms of constitutional adjudication systems such as the Constitutional Committee or the American type judicial review system in the past, the Republic of Korea finally established the Constitutional Court in 1988. And, different from its predecessors, the Constitutional Court has been known for its active and successful performance in adjudicating constitutional matters, as the last resort of upholding the Constitution and protecting fundamental rights of the citizens.

However, there are also some obstacles that should be hurdled by the Court, such as the issues related to its competence and jurisdiction, including lack of jurisdiction over the election disputes, lack of competence of constitutional review of statutory legislation in *abstracto* and no power to adjudicate the constitutional complaint against ordinary court's judgments, and the issues related to the process of nomination and appointment and term of Justices. In order to solve these problems, the Constitutional Court must examine in depth these issues and make necessary improvements.

This paper reviews 1) the institutional foundations of constitutional review in Korea, including current constitutional adjudication model and historical and legal reasons for its adoption and relations between the Constitutional Court and ordinary courts; 2) status and composition of the Constitutional Court of Korea, including qualifications, terms of Justices, possibility of their reappointment, procedure for nomination and appointment of Justices and guarantee of their independence; 3) jurisdictions of the Constitutional Court such as constitutional review of statutory provisions, adjudication on constitutional complaint, adjudication

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on competence disputes between state agencies, between state agency and a local government or between local governments, adjudication on the dissolution of political party and adjudication on the impeachment of high public officials; and 4) binding effect of the Court's decisions on the Legislature, the ordinary courts and on the Executive. Also, in its last part, this paper introduces several important cases in practice concerning civil liberties, social rights in pursuit of social justice, other fundamental rights and principle of equality for protecting women or particularly vulnerable minorities.

## A. Institutional Foundations of Constitutional Review

### I. Current Constitutional Adjudication Model and Historical, Legal Reasons for Its Adoption

#### (1) Establishment of the Constitutional Court

In the Republic of Korea, the Constitutional Court was established as a key part of the constitutional system with the start of the Sixth Republic in 1988.

While amending the Constitution in 1987, political factions were divided on how to structure the constitutional adjudication system. Eventually, it was agreed to establish an independent Constitutional Court for adjudicating all constitutional matters including constitutionality review of statutes as well as the other so-called political issues.

#### (2) Forms of constitutional litigation or judicial review systems in the past

- (i) the Constitutional Committee of the First Republic (1948-1960)
- (ii) the Constitutional Court of the Second Republic (1960-1961)<sup>1)</sup>
- (iii) the American-type judicial review system of the Third Republic (1961-1972)
- (iv) the Constitutional Committee of the Fourth Republic (1972-1981) and the Fifth Republic (1981-1988)

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<sup>1)</sup> The Constitutional Court of the Second Republic, however, was not established in practice due to the military coup d'état in 1961.

## II. Relations between the Constitutional Court and Ordinary Courts

Under the Constitution, the judicial function is divided into two institutions; ordinary courts comprising the Supreme Court and lower level courts and the Constitutional Court.

### (1) Interpretation and application of statutes of ordinary courts

In interpreting and applying statutes, ordinary courts must seek, first, to interpret and apply the statute in a manner consistent with the Constitution and, second, in case the constitutionality of the statute is at issue, must suspend their proceedings and seek a determination by the Constitutional Court. Once the interpreted content of a statute is declared unconstitutional by the Constitutional Court, it loses its legal validity. Ordinary courts are bound by the Court's decision and barred from applying that content to the instant case.

### (2) Exhaustion of all other relief

Constitutional complaints are meant to relieve anyone whose basic rights have suffered in the exercise or non-exercise of governmental power. Therefore, constitutional complaints may be in conflict with administrative litigation that deals with the rights of the individual in relation with the exercise or non-exercise of governmental power. For this matter, the Constitutional Court Act (Article 68, Section 1) forbids filing a constitutional complaint without having exhausted all other relief processes by the laws.

### (3) Constitutional complaint against ordinary court's judgments

According to Article 68, Section 1 of the Constitutional Court Act, judgments made by ordinary courts cannot be challenged through constitutional complaints. Thus, the Constitutional Court's power to adjudicate constitutional complaint does not extend to ordinary court judgments in principle.

Yet, when an ordinary court applies a statute that was declared unconstitutional by the Constitutional Court, and violates a person's basic rights as a result, such judgment can become the subject matter of constitutional complaints.

(4) Constitutional complaint against executive decrees, regulations, or administrative action

When the constitutionality or legality of executive decrees, regulations, or administrative actions is at issue in a trial, it is the Supreme Court that has the power of final review (Article 107 Section 2 of the Constitution). However, an ordinary court's ruling that an administrative legislation is unconstitutional has the effect of merely precluding its application in the case at hand only in the form of concrete review, rather than striking down the entire administrative legislation. In contrast, the decision by the Constitutional Court universally invalidates the affected decree or regulation.

In case a decree or regulation directly violates a person's basic rights, whether this can be subjected to constitutional complaint is in question. The Supreme Court maintained that the Constitution gives ordinary courts the entire and exclusive power to review decrees and regulations. By contrast, the Constitutional Court has claimed that under Article 107 Section 2 of the Constitution, the Supreme Court has jurisdiction to adjudicate the constitutionality of rules and regulations, but such adjudication is possible only when the constitutionality of these rules and regulations is a condition precedent to the outcome of an actual lawsuit, therefore, constitutional complaints must be permitted against administrative legislations that directly violate a person's basic rights because there is no way to file a lawsuit in ordinary courts to challenge the validity of the administrative legislation itself (2 KCCR 365, 89 Hun-Ma 178, October 15, 1990).

Moreover, to resolve such uncertainty, some maintain that Article 107 Section 2 of the Constitution should be repealed in its entirety, and the power to make a final review of the constitutionality of administrative decrees, regulations or actions, should be conferred exclusively upon the Constitutional Court.<sup>2)</sup>

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<sup>2)</sup> Regarding this issue, there had been a heated debate in the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly. In the draft of the final report of the Advisory Committee, Article 107 Section 2 of the Constitution was abrogated, but in the final report, it was decided that the current system should be maintained.

#### (5) Tension over modified holdings

The Constitutional Court and ordinary courts also went through a fair amount of tension over the modified holdings - “limited unconstitutionality” and “limited constitutionality” (also known as “constitutional in certain context” and “unconstitutional in certain context,” they are those of unconstitutionality without any deletion of text in the statute, being ‘the qualitative unconstitutionality in part’). The Constitutional Court took the view that these are sub-species of the decision of unconstitutionality, whereas ordinary courts argued that they are merely a form of legal interpretation rather than a binding decision of unconstitutionality.

However, the current Constitutional Court Act does not clearly dictate whether the modified holding binds ordinary courts. Meanwhile, some lawmakers attempt to amend and specify the statute to clearly confer the binding effects to the modified holdings of the Constitutional Court.

### B. Status and Composition of the Constitutional Court

#### I. The Constitutional Court as the Judicial Body

In reviewing the constitutionality of statutes, the only criterion for the Constitutional Court is the Constitution, not political preferences. The Constitutional Court has always maintained that it may not interpret the Constitution expansively so as to impose its own views on matters that were deliberately left open-ended by the Constitution to be determined by the political branches. Therefore the general view is that the Korean Constitutional Court is a judicial body rather than a political one.

#### II. Professional Qualifications for Members of the Constitutional Court

Nomination and appointment of Justices are limited to individuals qualified as attorney at law. Article 5 of the Constitutional Court Act lays down additional requirements. Justices shall be appointed among eligible persons with 40 years or more of age and who have been in any of the following positions for 15 years or

more<sup>3)</sup> : (1) Judge, Prosecutor, or Attorney; or (2) Person who has been engaged in legal affairs for a governmental agency or a public enterprise; or (3) Person who has been in a position higher than an assistant professor.

Some proposed to relax the qualifications to include law professors, etc. Such proposal was, however, not reflected in the current legislation.<sup>4)</sup>

### III. Term of Justices and Possibility of Reappointment

The term of office for Justices of the Constitutional Court is a renewable six years with a retirement age of sixty-five while it is seventy in case of the President.

Different from the similar provisions that stipulate the term of office of Justices of the Supreme Court, which has been revised from 65 years of age to 70 years of age, however, the provisions that stipulate the term of office of Justices of the Constitutional Court have yet to be revised.

In recent debates, many have argued for an extended, but non renewable term of at least nine years. Some also argue that the mandatory retirement age should be abolished, or at least be amended to remove the difference between that of the President and other Justices.

### IV. Procedure for Nomination and Appointment of Constitutional Court Members and Guarantee of Their Independence

The Constitutional Court is comprised of nine Justices appointed by the

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<sup>3)</sup> The provisions were revised in July 18, 2011 to fortify the qualification for appointees, so that the Chief Justice and Justices of the Supreme Court shall be appointed from among those who are forty five years of age or over. This revision will take effect from January 1, 2013. The provisions that stipulate the qualification of the President and Justices of the Constitutional Court, however, have yet to be revised.

<sup>4)</sup> With regard to this issue, according to the final report of the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly, not only a person who is qualified as a lawyer, but a person who is a law professor or has experience in managing national affairs becomes eligible to be a Justice of the Constitutional Court.

President of the Republic, of whom three shall be elected by the National Assembly, three nominated by the Chief Justice of the Supreme Court and three selected by the President of the Republic. Meanwhile, the President of the Constitutional Court of Korea is appointed by the President of the Republic from among the Justices, with the consent of the National Assembly.

With respect to this appointment process, some say that the role of experts is not significant. Some have also noted that the nomination of three Justices by the Chief Justice of Supreme Court seems democratically inappropriate and may lead to the underestimation of the Constitutional Court. There are also arguments that all Justices should be selected by the National Assembly, while others say that the presidential appointment of Justices other than the Court's President also requires the consent of the National Assembly.

## C. Jurisdiction of the Constitutional Court

### I. Constitutional Review of Statutory Legislation in Abstracto?

The Korean Constitutional Court does not have the competence of abstract judicial review. However, there is a discussion about adopting one which is requested by the government or one third of total members of National Assembly.

### II. Constitutional Review of Statutory Legislation

#### (1) Purpose

The Constitutional Court shall have the power to review the constitutionality of statutes upon requests from ordinary courts (Article 111 Section 1 of the Constitution). Adjudication on the constitutionality of statutes is an adjudication system which nullifies the statute that has been found unconstitutional by the Constitutional Court. It is a core component of constitutional adjudication, which secures checks-and-balances mechanism against the legislative branch for the purposes of protecting the Constitution.

(2) Causes for request

The ordinary courts may make a request for an authoritative determination by the Constitutional Court, ex officio or by decision upon a motion by the party, when in a pending case there is a reasonable doubt that the contents of a statute might be unconstitutional. When an ordinary court requests to the Constitutional Court adjudication on the constitutionality of statute, the proceedings of the court shall be suspended while the Constitutional Court makes a decision. In this sense, the Korean Constitution adopts a system of “concrete review of statutes.” The subject of adjudication on constitutionality includes formal statutes legislated by the National Assembly, as well as emergency presidential order, treaties and universally accepted international laws.

(3) Decision of constitutionality and its effect

The Constitutional Court may decide that a statute is constitutional or unconstitutional, and that a statute is nonconforming to the Constitution, limitedly unconstitutional or limitedly constitutional as modified decisions on unconstitutionality.

Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made : Provided, that the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively. In cases referred to in the proviso, a retrial may be allowed with respect to a conviction based on the statutes or provisions thereof decided unconstitutional (Article 47 Section 2 and 3 of the Constitutional Court Act).

Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments (Article 47 Section 1 of the Constitutional Court Act).

### III. Constitutional Complaint

(1) Purpose

The system of constitutional complaint provides a way for individuals to seek relief in cases where their constitutional rights have been violated by exercise or nonexercise of governmental power (Article 111 Section 1 of the Constitution;



Article 68 Section 1 of the Constitutional Court Act).

(2) Types and cause for request

To file a constitutional complaint, complainant's basic rights guaranteed under the Constitution should be directly and presently infringed by the exercise or non-exercise of the governmental power, except the judgment of the ordinary courts : Provided, that if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes (Article 68 Section 1 of the Constitutional Court Act).

Since the legislative power of the National Assembly is also a public power, a case where a statute that directly infringes upon the basic rights is legislated, or when the rights are infringed by the neglect of legislature by not enacting law which is mandated to be legislated, is also the subject for a constitutional complaint. So even if there is no concrete dispute being litigated at an ordinary court, an individual can file a constitutional complaint on the ground that a specific statute is infringing upon his constitutional rights. And if an individual's constitutional rights are being violated directly and currently by a statute, even before any specific act take places to implement it, the individual may file a constitutional complaint without having to go through prior relief procedures (2KCCR 200, 89 Hun-Ma 220, June 25, 1990).

And even when the Supreme Court dismissed certain exercise of administration power on the ground that it did not fit for judicial review, the Constitutional Court has extended its jurisdiction to permit a constitutional complaint against it, if there was a need for providing relief.

Under the American type judicial review system, the ordinary courts were timid in making any request for a review, so that the review powers of the constitutional adjudicator could rarely be exercised. In order to deal with this problem, Article 68 Section 2 of the Constitutional Court Act provides that, when the ordinary court does not make a request, the parties to the suit may trigger the Constitutional Court's power of concrete review by filing a constitutional complaint against the statute. This procedure is said to have worked effectively, in which nearly 15% of

these cases have been upheld at the Constitutional Court.

(3) Time limit for request

A constitutional complaint under Article 68 Section 1 shall be filed within 90 days after the existence of the cause is known, and within one year after the cause occurs: Provided, that a constitutional complaint to be filed after taking prior relief processes provided by other laws, shall be filed within 30 days after the notification of the final decision. If the basic rights are infringed by the occurrence of the cause to which the law is applicable, for the first time after the law is entered into force, a constitutional complaint shall be filed within 90 days after the existence of the cause is known, and within one year after the cause occurs (10-2 KCCR101, 95 Hun-Ba 19, July 16, 1998). The adjudication on a constitutional complaint under Article 68 Section 2 shall be filed within 30 days after a request for adjudication on constitutionality of statute is dismissed.

(4) Prior review

When a constitutional complaint is filed, the Panel conducts a prior review. In case of any of the followings, the Panel shall dismiss a constitutional complaint with a decision of unanimity : the constitutional complaint is filed without having exhausted all the relief processes provided by other laws, or is directed against the judgment of the ordinary court (except for cases in which the court applied the laws that the Constitutional Court declared as unconstitutional); a constitutional complaint is filed after expiration of the time limit prescribed in Article 69; a constitutional complaint is filed without a counsel, or the court-appointed counsel; a constitutional complaint is inadmissible and the inadmissibility cannot be corrected.

(5) Content of the adjudication

There are three types of decisions in the final judgment of the Constitutional Court : dismissal, rejection and upholding a case. Dismissal is made when the request was made unlawfully; rejection is made when the request of adjudication

does not have a rationale behind the request; and upholding is made when the request has reason.

According to Article 68 Section 1 of the Constitutional Court Act, if a request of adjudication was found to have rationale, the Constitutional Court must specify the exercise or non-exercise of governmental power that infringed basic rights. In this case, if the Constitutional Court finds that the cause of such infringement was from the laws or statutes, the Court may hold the statute unconstitutional. Provided, if the unconstitutionality of a clause makes the whole statute unenforceable, the Court may announce the whole statute unconstitutional.

A concurrent vote of six or more Justices is required to decide a statute as unconstitutional or to uphold a constitutional complaint.

#### (6) Effect of decision of unconstitutionality

In case of Article 68 Section 1 of the Constitutional Court Act, the upholding decision shall bind the ordinary courts, other state agencies and local governments. In particular, when a decision of upholding was made against the non-exercise of governmental power, the respondent must take new action in accordance with the decision. Regarding Article 68 Section 2 of the Constitutional Court Act, the upholding decision shall bind the ordinary courts, other state agencies and local government. Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made : Provided, that the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively.

When the constitutional complaint under Article 68 Section 2 of the Constitutional Court Act has been upheld, the party may claim for a retrial with respect to a final judgment having applied the statutes or provisions thereof decided as unconstitutional, whether criminal, civil or administrative. In addition, because the statutes or provisions relating to criminal litigation lose their effect retroactively, a person convicted based on a statute held as unconstitutional may claim a retrial, even if the case is not related to the constitutional complaint.

#### IV. Competence Disputes between State Agencies, between a State Agency and a Local Government or between Local Governments

##### (1) Purpose

When conflicts arise between state and local governments and agencies about the duties and authorities of each institution, it not only endangers the principle of checks and balances between public powers, but also risks paralyzing an important government function. This may pose a threat to the basic rights of citizens, which calls for a systemic coordinating mechanism.

The power to determine competence disputes between agencies of the central government, central and local governments, and between local governments has been given by the Constitution to the Constitutional Court as part of a function to safeguard the Constitution.

##### (2) Procedures

The request for adjudication may only be allowed when an action or omission by the defendant infringes or is in obvious danger of infringing upon the plaintiff's competence granted by the Constitution or laws (Article 61 Section 2 of the Constitutional Court Act).

Article 62 Section 1 of the Constitutional Court Act allows only the National Assembly, the Executive, the ordinary courts and the National Election Commission to become parties to competence disputes.

But, the Court has recognized the need to expand the scope of parties eligible for filing competence disputes and granted standing to individual members of the National Assembly as well as to its Speaker (9-2 KCCR 154, 96 Hun-Ra 2, July 16, 1997).

##### (3) Decision and effect of decisions

The content of the decision concerns the interested parties' existence or scope of the competence of a state agency or local government. In the case as referred to in the previous sentence, the Constitutional Court may nullify an action of the defendant which was the cause of the competence dispute or may confirm the

invalidity of the action, and when the Constitutional Court has rendered a decision upholding the request for adjudication against an omission, the respondent shall take a disposition in pursuance of the purport of decision. The decision on competence dispute by the Constitutional Court shall bind all state agencies and local governments. The decision to nullify an action of a state agency or a local government shall not alter the effect which has already been given to the person whom the action is directed against, in order not to cause confusion.

■ ***Competence Dispute between the City of Seoul and the Central Government (21-1(B) KCCR 418, 2006 Hun-Ra 6, May 28, 2009)***

The main text of Article 158 of the former Local Autonomy Act stipulates that “the Minister of Government Administration and Home Affairs ... may receive a report on the autonomous affairs of a local government, or inspect its documents, books or accounts.” And the proviso of the same Article stipulates that “in this case, the inspection shall be made only in respect of matters which are in violation of Acts and subordinate statutes.” Regarding the proviso of Article 158 of the Act, the Court held that the inspection power of a central administrative agency on the autonomous affairs of a local government stipulated in the proviso of Article 158 of the Act should not be considered preemptive, general and comprehensive power but be considered limited power in its subject matter and scope. The Court states that the subject matter of inspection notified by the Minister of Public Administration and Security actually covers almost all the autonomous affairs of Seoul City and therefore, the notification failed to specifically designate the matters to be inspected. And, when the Minister of Public Administration and Security notified the plan for joint inspection to the city, it did not identify which specific statutory provision was violated and what kind of local government affairs had been conducted in violation of such provision. As such, the joint inspection conducted by the respondents including the Minister of Public Administration and Security failed to fulfill the requirement stipulated in the proviso of Article 158 of the former Local Autonomy Act, thereby violating the self governing authority of Seoul City endowed by the Constitution and the Local Autonomy Act.

■ ***Competence Dispute between the Members of the National Assembly and the Chairman of the National Assembly (21-1(B) KCCR 14, 2009 Hun-Ra 8, 9, 10 (consolidated), October 29, 2009)***

Regarding the declaration of passing the Bill of the proposed revisions to the Act on the Freedom of Newspapers, etc. and Guarantee of their Functions (the Newspaper Bill), the Constitutional Court denied the request to confirm nullity of declaring passage of the Newspaper Bill on the ground that although there was procedural illegality in question and discussion during the voting process and such illegality infringed on the National Assembly members' right to deliberate and vote on laws, the declaration of passage itself in this case is not void.

V. Dissolution of A Political Party

The Constitutional Court has jurisdiction over the dissolution of a political party. If the objectives or activities of a political party impinge upon the fundamental democratic order, the Executive, upon a deliberation of the State Council, may request a judgment by the Constitutional Court for the dissolution of that political party.

When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved.

VI. Election Disputes

The Korean Constitutional Court does not have jurisdiction over the election disputes. In cases of presidential elections and general elections for the National Assembly, the Supreme Court has the jurisdiction over election litigation.

However, since national election is a democratic process which grants governmental power to its relevant authority under the Constitution, some suggest that the Constitutional Court having jurisdiction over such disputes is more desirable.

VII. Jurisdiction to Impeach High Public Officials

The Constitution provides that in case the President, heads of Executive Ministries, Justices of the Constitutional Court, judges, and other public officials

designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment. And then the Constitutional Court is authorized to adjudicate the charge brought by the National Assembly.

Article 53 Section 1 of the Constitutional Court Act provides that when a request for impeachment is upheld, the Constitutional Court shall pronounce a decision that the accused person be removed from the public office. To date, one impeachment case was brought before the Court and the case concerned the President of Korea.

In the *Presidential Impeachment Case*,<sup>5)</sup> the National Assembly passed a resolution to impeach then President Roh Moo-hyun. However, the Constitutional Court rejected the request for impeachment. The case is noted as the landmark case in which the Constitutional Court has resolved the divisions and tensions in a constitutionally viable manner in a relatively short period of time.

## VIII. Advisory Opinions

The Court is not competent to deliver advisory opinions.

## D. Binding Effect of Constitutional Decisions

### I. The Binding Effect on the Legislature

#### (1) Holding v. Reasoning

That the holding of the Court in the decision of unconstitutionality has the binding effect cannot be questioned. However, the theories and Constitutional Court's precedents are not clear as to whether the reasoning of the Court also has the binding effect, and whether the lawmakers are bound to follow the decisions of unconstitutionality without any exception is still subject to debate.

This is an issue when the lawmakers enact a statute or a provision that is identical or substantially similar to the statute or provision once held unconstitutional,

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<sup>5)</sup> 16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004.

that is, when so called repetitive enactment has occurred.

When considering the decisions of the Constitutional Court collectively, the basic attitude of the Constitutional Court would be interpreted into two possible ways which would have no particular difference in the way of problem solving: the first interpretation recognizes the binding effect on the National Assembly in a very limited way, admitting the exception when there are reasonable justifications of the repetition of legislation; and another interpretation does not recognize the binding effect on the National Assembly, however, it permits the legislature to enact the repetitive legislation only if there are reasonable justifications of the repetition of legislation, instead of allowing the unrestricted freedom of the repetition of legislation.

(2) Decision of nonconformity to the Constitution as a way of respecting the authority of the legislature

The Constitutional Court may provide a guideline to the legislature in the reasoning when rendering a decision of unconstitutionality, although such guideline would not directly bind legislators. Or, the Constitutional Court, as a way of respecting the authority of the legislature, may render a decision of nonconformity to the Constitution despite some part of the statute is unconstitutional, setting a time limit for the enactment of a new legislation. In that case, if the time for the enactment expires, the existing statute, which has not been amended within the time limit, would automatically lose its effect.

The Constitutional Court has rendered 140 decisions of nonconformity to the Constitution, while declaring 101 statutes as nonconformity to the Constitution, during the 23 years of the history of the Constitutional Court. However, 7 statutes have still remained unamended even after the time has expired (as of October 31, 2011).

## II. The Binding Effect on the Ordinary Courts

(1) Effect of statutory provisions ruled as unconstitutional

In principle, the statute or the provision thereof ruled as unconstitutional shall



lose its effect from the day on which the decision is made. However, if the statute or provision thereof relates to criminal penalties, it shall lose its effect retroactively. Nonetheless, the Constitutional Court has said that the retroactive effect exceptionally may be applied to the following cases : Firstly, when retroactive effect is necessary to safeguard the effectiveness of concrete judicial review such as; (i) to the case which brought an opportunity to adjudicate on the constitutionality whether by request from ordinary courts or by constitutional complaint, (ii) to the case under which the request for review of the statute is made to the ordinary courts or to the Constitutional Court before the ruling of the unconstitutionality on such statute, or (iii) to the on-going case though the request for review has not been made, in which the statute or provision in question thereof applies. Secondly, to the case where concrete validity to relieve the party is imminent while legal certainty will not be decreased by applying the retroactive effect. On the other hand, the case where legal certainty would not be decreased and the vested rights formed by the old law would not be infringed, while denial of retroactive effect in such a case would be against the constitutional rights of equality and justice, the retroactive effect may also be applied. In addition, whether the case fits within these categories is the matter to be stated in the holding of the case as the Constitutional Court, having an authority of judicial review, holds the statute as unconstitutional. However, when it is not stated within the holding, whether the above exception should apply to the case, will be decided by ordinary courts in a reasonable way and in a way that fits the purpose, by reviewing history, nature, and purpose of the statute and by balancing all the interests in the case (May 13, 1993, 92 Hun-Ka 10).

## (2) Tension over the binding effect of modified holdings

The Constitutional Court has held that the decisions of unconstitutionality of a statute include the decision of holding a statute as limitedly constitutional, limitedly unconstitutional as well as nonconforming to the Constitution, and as such all of these decisions have binding effect in accordance with Article 47, section 1 of the Constitutional Court Act (9-2 KCCR 842, 96 Hun-Ma 172, 173 (consolidated), December 24, 1997).

Nevertheless, the Supreme Court maintains that the decision of limited constitutionality and unconstitutionality is merely an expression of the Constitutional Court's view on how the statutory provision should be interpreted, and since interpretation and application of statutes are the exclusive province of the ordinary courts, the Constitutional Court's preference on statutory interpretation does not have binding effect on ordinary courts (Sup. Ct. 95 Jaeda 14, April 27, 2001).

#### ■ Example : Income Tax Act Case

When the Constitutional Court declared that some provisions of the Income Tax Act were limitedly unconstitutional (7-2 KCCR 616, 94 Hun-Ba 40, 95 Hun-Ba 13 (consolidated), November 30, 1995), the Supreme Court stated that such a decision is not binding on ordinary courts since it is merely an expression of the Constitutional Court's view on how the statutory provision in question should be interpreted and refused to follow the decision of the Constitutional Court.

In a constitutional complaint case requesting cancellation of the decision, however, the Constitutional Court held that Article 68 Section 1 of the Constitutional Court Act is unconstitutional to the extent the provision is interpreted to exclude from constitutional review those judgments that enforce law already ruled as unconstitutional by the Court, and cancelled the decision of the Supreme Court (9-2 KCCR 842, 96 Hun-Ma 172, 173 (consolidated), December 24, 1997). The tax administrative decided not to enforce the taxation, and thus the decision of the Constitutional Court prevailed.

### III. The Binding Effect on the Constitutional Court

The Constitutional Court may change its decision from its prior decisions having same or similar statutes at issue. In this respect, the binding effect of the decision does not reach the Constitutional Court itself. Nonetheless, the Court should respect prior decisions and their reasons if there is no change of circumstances or necessity to rule otherwise.

When the Court changes its previous views on the interpretation of the Constitution or statutes, six votes are also required (Article 23 of the Constitutional Court

Act). To date, the Constitutional Court has overruled its cases 20 times.

#### IV. The Binding Effect on the Executive

The executive has showed a good record in following the decisions of the Constitutional Court. And no specific issues have not been founded yet regarding binding effect on the executive.

### E. Constitutional Review in Practice

#### I. Cases Concerning Civil Liberties

##### ■ *Extension of Detention Period for Criminal Suspects under the National Security Act Case* (4 KCCR 194, 206, 210, 90 Hun-Ma 82, April 14, 1992)

The Court held that Article 19 of the National Security Act extending detention period up to 50 days in relation to the crimes prescribed in the Act allows unnecessarily long detention, and therefore, clearly violates the personal liberty, the principle of the presumption of innocence and the right to a speedy trial.

##### ■ *Prohibition of Inmates from Exercising Case* (16-2(B) KCCR 548, 2002 Hun-Ma 478, December 16, 2004)

The Court held that an outdoor exercise is the minimum basic requirement for the maintenance of physical and mental health of the inmates who are imprisoned.

Therefore, the absolute ban of exercise of the inmate subjected to the forfeiture of rights is beyond the necessary minimum degree, thus in violation of the human dignity and values under Article 10 of the Constitution and of the bodily freedom under Article 12 of the Constitution.

##### ■ *Motion Picture Rating Case* (13-2 KCCR 134, 2000 Hun-Ka 9, August 30, 2001)

The Court ruled that the Korean Media Rating Board's withholding the rating of a film amounts to censorship prohibited by the Constitution and, therefore

violates the Constitution.

■ ***Prior Censorship of Broadcast Advertisements Case (20-1(B) KCCR 397, 2005 Hun-Ma 506, June 26, 2008)***

The Constitutional Court decided that subjecting broadcasting advertisements to prior review by the Korea Advertising Review Board, to which the Korea Broadcasting Commission has entrusted prior review, is prior censorship prohibited by the Constitution, and therefore violates the Constitution.

■ ***Military Secret Leakage Case (4 KCCR 64, 89 Hun-Ka 104, February 25, 1992)***

The Court said that the military secrets should be limited to the necessary minimum in order to maximize the scope of the subject matter open to people's freedom of expression and right to know.

■ ***Ban on Assemblies near Foreign Diplomatic Missions Case (15-2(B) KCCR 41, 58-59, 2000 Hun-Ba 67 etc., October 30, 2003)***

The Constitutional Court held that the part of "foreign diplomatic missions" in Article 11, Section 1 of the Assembly and Demonstration Act, which imposed a blanket ban without exception on outdoor assemblies within one hundred meters from the perimeters of foreign diplomatic missions stationed in Korea, violated the principle of the least restrictive means, exceeding the scope of necessary measures required to achieve the legislative purpose.

■ ***Nighttime Outdoor Assembly Ban Case (21-2(B) KCCR 427, 2008 Hun-Ka 25, September 24, 2009)***

The Constitutional Court overturned the decision of constitutionality rendered in 1995 and in an opinion of 5(unconstitutional) : 2(nonconforming) : 2(constitutional), held that provision of the Assembly and Demonstration Act does not conform to the Constitution. Article 10 of the Act principally bans outdoor assembly before sunrise or after sunset<sup>6)</sup> with an exception in the proviso that permits such

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<sup>6)</sup> But, according to Article 15 of the Act, Article 10 of the Act is not applicable to

outdoor assembly when the head of competent police authority grants permission in certain cases. Regarding this, the Constitutional Court stated that the provision sets time limit for outdoor assembly but the proviso relieves the severity of the restriction, and the “permission of the head of competent police authority” should not be regarded as the advance permit. Therefore, regardless of the proviso, Article 10 of the Act does not violate the prohibition of advance permit by Article 21, Section 2 of the Constitution. But, the Court held that the provision does not conform to the Constitution as it bans outdoor assembly in a wide range of timeframe, thereby violating the principle of the prohibition of excessive restriction and failing to strike balance between legal interests.

■ ***Joint Penal Provision Case (21-2(A) KCCR 64, 2008 Hun-Ka 10, July 30, 2009)***

The Constitutional Court held unconstitutional the provision of the Juvenile Protection Act which punishes a juristic person when an employee or other service workers of a juristic person commit an offense with respect to the business of such juristic person, without considering whether the juristic person is jointly or contributorily liable for the offense committed by the employee or service workers. Regarding this, the Constitutional Court stated that although it is necessary to keep a tight rein on the prevalent wrongful activities of juristic persons in this modern society by imposing direct punishment on them, once the legislature opts to criminally punish a certain wrongful act, such punishment should be imposed to the extent that it does not violate the constitutional principle of the rule of liability derived from the rule of law and the principle of *nulla poena sine lege*.

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assemblies relating to academic purpose, art, sports, religion, ritual, social gathering, entertainment, the four ceremonial occasions of coming of age, wedding, funeral and ancestral rites and national celebration.

■ ***Partial Pretrial Detention Credit Case (21-1(B) KCCR 784, 2007 Hun-Ba 25, June 25, 2009)***

The Constitutional Court held unconstitutional the provision of Criminal Act that allows a judge's discretion of giving partial pretrial detention credit, on the ground that the provision infringes on the freedom of body and violates the constitutional principle of the presumption of innocence and due process. Also, the Court articulated that the "pretrial credit provision" cannot be a proper measure to achieve the legislative intent of deterring appeals and preventing frivolous appeals, but it obstructs a criminal defendant's right to trial and an appeal under the pretext of preventing frivolous appeals.

■ ***Adultery Case (20-2(A) KCCR 696, 2007 Hun-Ka17, etc., October 30, 2008)***

In this case, although the majority of five Justices presented the opinion of unconstitutionality, the Constitutional Court decided that, in an opinion of 5(unconstitutional) : 4(constitutional), Article 241 of the Criminal Act, which imposes imprisonment as the only statutory sentence in the criminal punishment of adultery or fornication with a married person, does not contradict the Constitution since the quorum of six votes required for the holding of unconstitutionality is not met.

The Court stated that the provision at issue restricts adultery and fornication in order to protect marital relationship and preserve social order and acts as an appropriate means to serve the legitimate legislative purpose. Whether the restrictive regulation involving criminal punishment is excessive may be of issue, but this basically falls into the freedom of legislation. Given the Korean legal awareness that adultery harms social order and violates others' rights as well as the strong demand for preemptive prevention of adultery, the legislature's judgment to criminally punish adultery is not arbitrary. Also, the Court stated that the provision at issue cannot be regarded as infringing on the individual right to sexual autonomy and privacy in violation of the rule against excessive restriction, and although it is true that the provision imposes only imprisonment as statutory sentence, this does not necessarily mean that the punishment is overly excessive.

Meanwhile, regarding the dissenting opinion of five Justices, three Justices presented an opinion of unconstitutionality on the ground that the provision restricts the individual right to sexual autonomy and privacy in violation of the rule against excessive restriction and one Justice presented an opinion of incompatibility with the Constitution on the ground that the provision goes beyond the legitimate boundary of state power over criminal punishment under the rule of law. Also, one Justice presented an opinion of unconstitutionality on the ground that the provision violates the principle of proportionality between the criminal responsibility and the punishment.

■ ***Engagement Fraud (having sexual relationship/intercourse on false promise of marriage) Case (21-1(B) KCCR 520, 2008 Hun-Ba 25, 2009 Hun-Ba 191 (consolidated), November 26, 2009)***

The Constitutional Court held unconstitutional a statutory provision that makes illegal for a man to have sexual relations with a woman by making a false marriage offer, by a vote of 6 : 3, overruling its 2002 ruling where seven justices upheld the constitutionality of the aforementioned provision. The Court said that having sexual relationship is located in the heart of people's privacy against which the state's interference should be as minimum as possible. But, the provision not only infringes on men's right to decide on sexual behavior, privacy and freedom but also denies women's right to make her own decision to have sex under the guise of protecting women. Also, as the subject of protection is limited to women who have no habit of acting obscenely, thus focusing sexual ideology based on patriarchy and moralism on women, it is in violation of equality in gender.

■ ***Death Penalty Case (22-1(A) KCCR 36, 2008 Hun-Ka 23, February 25, 2010)***

The Constitutional Court, in an opinion of 5(constitutional) : 4(unconstitutional), held constitutional the system of death penalty. First, the Court states that although the current Constitution neither directly recognizes nor prohibits the death penalty, it is required that the death penalty system should be regarded as being implicitly recognized by the Constitution through its interpretation in connection

with other constitutional provisions. Also, the Court states that even though a person's life in an ideal sense is deemed to have an absolute value, the Constitution does not textually recognize absolute basic rights and moreover, it also prescribes that all of the people's freedom and rights may be restricted only when necessary for national security, the maintenance of law and order or for public welfare under Article 37 Section 2. Therefore, the right to life may be subject to the general statutory reservation in accordance with Article 37 Section 2 of the Constitution in order to protect other lives at least with same value or public interests with same importance. Also, as long as the death penalty is sentenced only for the cruel and heinous crime, the death penalty system itself violates neither the constitutional principle of proportionality, satisfying all the elements of legitimacy of purpose, appropriateness of means, the least restrictive means and balance between legal interests, nor Article 10 of the Constitution which stipulates human dignity and value.

■ ***Case on Real Name Verification for Election Campaign via Internet (22-1(A) KCCR 347, 2008 Hun-Ma 324, 2009 Hun-Ba 31 (Consolidated), February 25, 2010)***

The Constitutional Court, in an opinion of 7(constitutional) : 2(unconstitutional), held constitutional Article 82-6 Section 1, Section 6 and Section 7 of the former Public Officers Election Act which stipulate that every internet press agency shall, if it allows anyone to post information expressing his support for or opposition to candidates or political parties on the bulletin board and chatting page of its web page, take technical measure to have his real name identified and shall delete such postings without the sign of "real name verification."

■ ***Case on Prohibition of Transmitting False Communication with Intend to Harm the Public Interest (22-2(B) KCCR 684, 2008 Hun-Ba 157, December 28, 2010)***

The Constitutional Court, in an opinion of 7(unconstitutional) : 2(constitutional), held unconstitutional Article 47 Section 1 of the Electronic Telecommunication Act (hereinafter, the "Instant Provision") which criminalize those who transmit false communication through electronic communication facility with the intent to



harm the public interest. The part of “public interest” used in the Instant Provision is unclear and abstract, failing to elaborate a concrete standard to constitute the elements of a crime, and since the public interest is such an abstract concept, whether a certain expression violates the public interest drastically varies depending on individual’s value system and ethical standard. Furthermore, in the current pluralistic and value subjective society, the public interest at issue is not monolithic when a certain act becomes an issue. Therefore, the Instant Provision runs afoul of the Constitution, violating the clarity required for guaranteeing the freedom of expression and the rule of clarity under the principle of *nulla poena sine lege*.<sup>7)</sup>

■ **Blockading Seoul Plaza Case (177 KCCG 974, 2009 Hun-Ma 406, June 30, 2011)**

In an opinion of 7(unconstitutional) : 2(constitutional), the Constitutional Court decided that blockade of Seoul Plaza by encircling it with police buses according to the command of Commissioner General of the National Police Agency, thereby restricting the access to Seoul Plaza of complainants, is unconstitutional as it infringes general freedom of action. Despite a conceded possibility that illegal and violent assemblies or demonstrations may take place, a preventing measure should

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<sup>7)</sup> In the dissenting opinion, I wrote that “public interest” in the Instant Provision means ‘the interest of all or the majority of citizens who live in Korea and the interest of a state composed of those citizens’ and “false communication” is about something of which truthfulness or falsity can be objectively verified, thereby meaning something of false contents and of false pretense, and therefore, the meanings of those words are not ambiguous. Meanwhile, the Instant Provision, intended to prevent disorder of the public order and disturbance of social ethics, is an appropriate means to achieve the legitimate legislative purpose. Also, given the facts that dissemination of false information through electric communication has severe ramification; is difficult to be voluntarily and autonomously corrected by communication users in a swift manner although it is clearly and indisputably false; and it takes high social expense for the lengthy discussion surrounding false information, it is required that, to a certain degree, a stricter restriction should be apply to the palpably false information than to the conventional act of expression. Therefore, I dissented from the majority opinion, finding that the Instant Provision does not violate the Constitution, not infringing on the freedom of express in violation of the rule against excessive restriction.

be taken to the minimal extent necessary to prevent riot, depending on the specific and individual circumstances. The restriction of any assembly and passage of ordinary citizens at Seoul Plaza would not be a necessary and minimal measure under the circumstances. Even if the necessity is recognized, the less restrictive means would be available as by establishing some passageways or permitting transit when the possibility of assembly is low or traffic is congested. Because the complete control over passage of citizens exceeds the minimal necessity, it violates the principle against excessive restriction as it infringes the basic rights.<sup>8)</sup>

■ ***Case on Conscientious Objectors (23 KCCG 602, 1205, 2008 Hun-Ka 22, August 30, 2011)***

In an opinion of 7(constitutional) : 2(limited constitutionality), the Court rendered a decision of denial regarding the request for a constitutional review of Article 88 Section 1 of the Military Service Act (hereinafter, the Instant Provision), which stipulates punishment against those who have received a notice of enlistment in the active service or a notice of call (including a notice of enlistment through recruitment) and fail to enlist in the army or to comply with the call without any justifiable reason. The Court stated that although the Instant Provision limits the freedom of conscience of the conscientious objectors, legitimacy of the legislative purpose and appropriateness of means are recognized as the Instant Provision aims to protect national security and maintain equality in compulsory military service. Also, the Instant Provision does not violate the principle of least restrictive means although it provides for a criminal punishment without introducing the alternative military service system, as long as it is hard to clearly conclude that allowing alternative service to be approved does not interfere with achievement of such

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<sup>8)</sup> Assuming Article 3 of the Police Act and Article 2 of the Act on the Performance of Duties by Police Officers may be the legal ground, I am of the opinion that the restriction of passage does not violate the principle against excessive restriction as following reasons: the passage restriction is not excessive because it was temporary and the place, Seoul Plaza, was limited; the alternative methods suggested by the Court Opinion would not be practical under the dangers at that time; and the public interests to protect life, body, and property of Citizens from the illegal and riot demonstrations exceed the private interests of temporary passage.

public interests. The Instant Provision also strikes balance between legal interests. Therefore, the Instant Provision does not infringe on the freedom of conscience.

## II. Cases Concerning Social Rights in Pursuit of Social Justice and Property Right

### ■ **Right to Receive Social Protection**

The legislature enjoys broad legislative-formative power in making laws regarding the fundamental social rights such as the right to receive social protection. The legislature can make a legislative decision within reasonable standard combining all necessary socio-economic considerations. The legislative decision is not in violation of the Constitution unless such a decision is absurdly arbitrary or falls far short of providing the minimum necessary protection for the fundamental social rights (13-2 KCCR 422, 433, 2000 Hun-Ma 342, September 27, 2001).

### ■ ***Taxation of Married Couple's Income from Assets Case* (14-2 KCCR 170, 2001 Hun-Ba 82, August 29, 2002)**

The Court held that Article 61 of the Income Tax Act, which required the aggregation of assets incomes for married couples for purposes of calculating the income tax, discriminated against married couples, and therefore is unconstitutional.

### ■ ***Comprehensive Real Estate Tax Case* (20-2(B) KCCR 1, 2006 Hun-Ba 112, 2007 Hun-Ba 71 · 88 · 94, 2008 Hun-Ba 3 · 62, 2008 Hun-Ka 12 (Consolidated), November 13, 2008)**

The Court ruled that the comprehensive real estate tax system itself, including the imposition of comprehensive real estate taxes on the subjected lands, does not violate the Constitution, given the legitimacy in legislative purpose and the characteristics and burden of the comprehensive real estate tax system. The Court, however, decided that the provision on the comprehensive real estate tax on house that stipulates aggregate taxation of households, imposing large amount of real estate taxation without considering the homeowner's circumstances as to possession of houses, excessively restricts the property right of homeowners beyond the

necessary degree required to achieve the legislative purpose, thereby violating the rule of least restrictive means and balance between legal interests. Also, the Court held that the provision does not conform to Article 36, Section 1 of the Constitution, which ensures people's marriage and family life and gender equality, because it discriminates those who have family such as married couples or those who compose a household with family members against the individually taxed singles, couples in common law marriage, homeowner who are not household members, and etc.

■ ***Reversion of Pro-Japanese Collaborators' Property to the Nation Coffers Case (174 KCCG 548, 2008 Hn-Ba 141, March 30, 2011)***

By a 5(constitutional) : 2(limitedly unconstitutional in part)<sup>9)</sup> : 2(partially unconstitutional) vote, the Constitutional Court ruled that the later part of Article 2 Item 2 of the Act on Reversion of Pro-Japanese Collaborators' Property to the Nation Coffers presuming the property acquired by pro-Japanese collaborators from Russo-Japanese War (1904-1905) to the National Liberation Day (August 15, 1945) was rewards for pro-Japanese activities and the main text of Article 3 Section 1 of the above Act stipulating the pro-Japanese collaborators' property should be reverted to the Nation Coffers at the time of acquiring do not violate the Constitution. While the legislature has a broad discretion in allocating the burden of proof and the Nation would have difficulty in proving pro-Japanese collaborators'

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<sup>9)</sup> Because the modern property ownership of Korea has been developed with preparing the cadastral map (or land registration map) by Japan in 1912, a land that had been acquired regardless of pro-Japanese activities before cadastral survey (or land survey) would be presumed to be the land acquired during the above period. As a result, such land is presumed as the property of pro-Japanese collaborators according to the presumption provision. In order to reverse such presumption, a party should prove that the land had been actually acquired before 1904. However, there had been no public notification method with general effects with regard to the land ownership before drafting a cadastral map, and it is difficult to prove factual background smore than a hundred years ago, implying the property which is not related to pro-Japanese activities may be reverted under the presumption provision. Therefore, I am of the opinion that it is unconstitutional to include "acquisition according to the cadastral survey" to the "acquisition" of the presumption provision.

property which had been acquired long ago, a person who acquired the property would presumably know the acquisition statement, thereby the presumption provision with regard to pro-Japanese collaborators' property not infringing the right to trial or due process, beyond the legislative discretion. Even if the above provision is truly retroactive, it should be allowed when the retroactive provision is exceptionally justified. Considering of the nature of betrayals of the people implied by pro-Japanese collaborators' property and the contents of the Preamble of the Constitution, the retroactive reversion of pro-Japanese collaborators' property would be reasonably foreseeable. Besides, the property subject to the reversion is limited to four categories whose cases are significant and whose scopes are clear; and a party who is subject to the reversion of the pro-Japanese collaborators' property can defend against the reversion by proving the property had not been the reward for pro-Japanese activities. Therefore, the provision of reversion of pro-Japanese collaborators' property to the Nation Coffers does not violate Article 13 Section 2 of the Constitution and nor infringe the right to property.

### III. Cases Concerning Other Fundamental Rights

#### ■ *Relocation of the Nation's Capital Case* (16-2(B) KCCR 1, 2004 Hun-Ma 554, 566 (consolidated), October 21, 2004)

The Constitutional Court held unconstitutional the Special Act on the Construction of a New Administrative Capital, which mandated relocation of the capital and set forth procedure of the relocation, on the grounds that although not explicitly stated in the text of the Constitution, Seoul's status as the nation's capital has been legally effective for more than 600 years as an endearing legal custom and regarded as a part of the most fundamental and self-evident customary constitutional norms since the establishment of the Korean constitutional system. Moreover, the Court stated that the wide consensus among the people that the capital of Korea is Seoul has existed even before the drafting of our written constitution and has gained the status of unwritten constitution, and therefore, in order to repeal certain practices exercised on the basis of such a customary constitutional norm, it is required to follow the procedures required for revising the Constitution. In this

regard, the Court held that as the ‘Special Act on the Construction of a New Administrative Capital’ was passed without going through the process of constitutional revision, which is an attempt to make changes to the Constitution through an ordinary statute, it infringes on the right to vote of the citizens in the constitutional revision.

■ ***Case on Prohibition of Appeal against Decision of Criminal Compensation (22-2(B) KCCR 180, 2008 Hun-Ma 514, October 28, 2010)***

The Constitutional Court unanimously held that Article 19 Section 1, which stipulates a single trial system for criminal compensation by prohibiting any appeal against the decision of criminal compensation, is unconstitutional. The provision of this case is not compatible with the nature of the judicial system that pursues the appropriateness and justice of trial since it overemphasizes legal stability, and therefore, infringes the right to criminal compensation and right to trial, in violation of the Constitution.

■ ***Case related to Administrative Omission filed by Japanese Military Comfort Women (23 KCCG 602, 1285, 2006 Hun-Ma 788, August 30, 2011)***

In an opinion of 6(unconstitutional) : 3(dismissal), the Constitutional Court confirmed unconstitutionality of an administrative omission by the respondent (Ministry of Foreign Affairs and Trade) that has not resolved the conflict between Korea and Japan in accordance with the procedures stipulated in Article 3 of the “Agreement on the Settlement of Problems concerning Property and the Right to Claim and on the Economic Cooperation between the Republic of Korea and Japan” (hereinafter, the Agreement), regarding the interpretation about whether the complainants’ right to request compensation against Japan as Japanese Military comfort women has lapsed by Article 2 Section 1 of the Agreement. Considering Article 10, Article 2 Section 2 and the Preamble of the Constitution and Article 3 of the Agreement, the respondent’s duty to proceed to dispute resolution procedures according to Article 3 of the Agreement should be regarded as a duty to act derived from the Constitution, and such a duty is concretely stipulated in

the Act. Also, given the seriousness of infringement on the complainants' property right and human dignity and value and the urgent necessity and possibility of relief, it is hard to say that the respondent has discretionary power not to execute the duty to act and the respondent has been faithfully conducting the aforementioned duty to act, or the duty to execute the dispute resolution procedures. Therefore, the respondent's omission infringes on the complainants' fundamental rights in violation of the Constitution.<sup>10)</sup>

#### IV. Cases Concerning Principle of Equality for Protecting Women or Particularly Vulnerable Minorities

##### ■ *Same-Surname-Same-Origin Marriage Ban Case (9-2 KCCR 1, 17-18, 95 Hun-Ka 6, etc., July 16, 1997)*

The Court held that Article 809 of the Civil Act, which prohibits marriage between two persons who have the same family names and come from the same ancestral line, not only loses its social acceptance or rationality as a marriage ban, but also is in direct conflict with the constitutional ideas and provisions regarding "human dignity and worth and the right to pursue happiness" and the constitutional provisions regarding establishment and maintenance of marriage and family life on the basis of "individual dignity and gender equality." In addition, since the scope of prohibition is limited to the same surnames, in other words, those with the same patrilineal blood ties, it is gender discrimination without any rational ground, thereby violating the constitutional principle of equality.

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<sup>10)</sup> In this case, I dissented from the Court Opinion on the following grounds : on the basis of Article 10, Article 2 Section 2 and the Preamble of the Constitution and Article 3 of the Agreement, no concrete duty to proceed to dispute resolution procedures according to Article 3 of the Agreement for the complainants is imposed on the State. And, resolving the dispute on interpretation of the Agreement through a diplomatic channel or submitting it to arbitration process is neither a 'matter of duty' nor a 'concrete' duty to act. Also, the interpretation of the Court Opinion exceeds the scope of the Constitution, the statutory provisions and constitutional interpretation of legal principles. Therefore, the constitutional complaint should be dismissed as unjustified.

■ ***Nationality Act Case* (12-2 KCCR 167, 97 Hun-Ka 12, August 31, 2000)**

The former Korean Nationality Law adopted the patrilineal lineage system that coincided a child's nationality at birth to its father's nationality and discriminatingly granted the mother's nationality only supplementary importance. Such discrimination between the child of a Korean father and a foreigner mother and that between a Korean mother and a foreigner father disadvantage the children of Korean mothers and the mothers themselves, and thus the Court held that the law violates the principle of male-female equality under Article 11 Section 1 of the Constitution.

■ ***Case on the House Head System* (17-1 KCCR 1, 2001 Hun-Ka 9, etc., February 3, 2005)**

The Court held that Article 778 of the Civil Act ("A person who has succeeded to the household lineage or has set up a branch household or who has established a new household or has restored a household for any other reason shall become the head of a household.") not only goes against the human dignity as a status of house-head is designated by law regardless of the intention or self determination of the people concerned, but also discriminates men and women in achieving the status as a house-head.

Also, regarding the latter part of the main text of Article 781 Section 1 ("a child shall be entered into his or her father's household") and the main text of Article 826 Section 3 ("the wife shall be registered to her husband's household.") of the Civil Act, the Court stated that the provisions violate the human dignity as they one-sidedly form marital relations and relations with children and runs afoul of the Constitution by discriminating men and women without justifiable grounds. However, should the Court render a decision of unconstitutionality and thereby the provisions at issue lose their effects immediately, a legal vacuum would occur. In order to prevent such a problem, the Court pronounced a decision of incompatibility with the Constitution to temporarily enforce the provisions at issues until revised.



■ ***Visually Handicapped Massagist Case (20-2(A) KCCR 1089, 2006 Hun-Ma 1098, 1116, 1117 (Consolidated), October 30, 2008)***

The Court states that the challenged provision which authorizes the massagist license only to visually impaired people aims to enable rewarding lives and realization of the right to humane living conditions for the visually impaired, and satisfies the legitimacy of the legislative purpose. Therefore, the Court held that the provision is neither against the right of equal treatment nor the freedom of occupational choice, and is within the constitutionally permitted level of restriction of basic rights under Article 37 Section 2.

■ ***Restriction on Authority to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case (21-1(A) KCCR 156, 2005 Hun-Ma 764, 2008 Hun-Ma 118 (consolidated), February 26, 2009)***

The Constitutional Court decided that Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents which prevents the prosecution of a driver who causes a traffic accident leading to serious injury by negligence in the conduct of business or gross negligence violates the victim's right to be heard at trial stipulated in the Constitution.

Also, regarding the discrimination between severely injured victims of traffic accident which does not fall under the proviso of Article 3 Section 2 and those who are seriously injured from the traffic accidents that fall under the proviso, or the victims who died from any traffic accidents, the Court held that such discrimination does not have reasonable ground because it prevents victims from exercising the right to be heard at trial due to the coincidence that the victims happened to be injured by accidents not falling under the proviso. Also the Court held that the discrimination between the victims who died from any traffic accident and the severely injured victims who are in a vegetative state or suffer incurable injury caused by accidents not falling under the proviso is also without proper ground because the illegality of the result of the serious injury cannot be less than the accident causing death. Therefore, the part of Article 4 Section 1 that prevents the prosecution of a driver who causes a traffic accident leading to

serious injury by negligence in the conduct of business or gross negligence runs afoul of the Constitution, in violation of the equality right.

■ ***Case on Imposition of the Duty to Serve in the Military only on Men (22-2(B) KCCR 446, 2006 Hun-Ma 328, November 25, 2010)***

The Constitutional Court, in an opinion of 6(denial) : 2(unconstitutional) : 1(dismissal), denied a constitutional complaint on Article 8 Section 1 of the Military Service Law (hereinafter the “Instant Provision”) which stipulates that every man who is a national of the Republic of Korea shall be enlisted into the first militia service when he attains eighteen years of age.

Given the facts that men as a group are better equipped with physical condition suitable to combats than women as a group; that it is practically impossible to come up with objective comparison among individuals about suitability for combat based on physical capacity of every single person; and that even for a woman who has superior physical capacity, some of woman’s physical peculiarities such as menstruation, pregnancy, or delivery could be burden to be used as military manpower, the Instant Provision’s stipulation by which only men can be subject to mandatory military service cannot be considered as distinctively arbitrary treatment, and therefore does not violate the right to equality.

## F. Conclusion

After having gone through the inactive and sometimes merely ornamental forms of constitutional adjudication systems such as the Constitutional Committee or the American type judicial review system in the past, the Republic of Korea finally established the Constitutional Court in 1988. And, different from its predecessors, the Constitutional Court has been known for its active and successful performance in adjudicating constitutional matters, as the last resort of upholding the Constitution and protecting fundamental rights of the citizens.

Despite its relatively short history of twenty three years, the Constitutional Court has succeeded in firmly establishing both the constitutional adjudication

system in this country and itself as a constitutional institution. The Constitutional Court has become rooted in the minds of the people as the final defender of their basic rights, receiving broad support and positive evaluations from jurists, scholars and the people. For example, in polls by the newspaper, the Constitutional Court is voted every year as the most trusted governmental institution. Also, the Constitutional Court is now expanding its scope to the outside of the country, exercising its leadership in establishing the “Association of Asian Constitutional Courts and Equivalent Institutions” which was created through Jakarta Declaration in 2010, and the writer was the Chairperson of the Preparatory Committee of the Association. The Inaugural Congress of the Association of Asian Constitutional Courts and Equivalent Institutions will be held in Seoul, in May 2012.

However, there are also some obstacles that should be hurdled by the Court, such as the issues related to its competence and jurisdiction, including lack of jurisdiction over the election disputes, lack of competence of constitutional review of statutory legislation in *abstracto* and no power to adjudicate the constitutional complaint against ordinary court’s judgments, and the issues related to the process of nomination and appointment and term of Justices. In order to solve these problems, the Constitutional Court must examine in depth these issues and make necessary improvements.

Keeping all the citizens’ support and faith in mind, the Constitutional Court must disseminate through constitutional adjudication the constitutional values grounded in human dignity and worth to the entire society so that the Constitution becomes the living norm that defines the basic conditions of the people’s lives. Only then will the Constitutional Court be able to take root and acquire the people’s trust and affection, and bear in abundance the beautiful constitutional fruits of human dignity and worth, liberty, and equality.

&lt;Table 1&gt; Case Statistics of the Constitutional Court of Korea

As of December 31, 2011

Type	Total	Constitutionality of Law <sup>1)</sup>	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
						Sub total	§68 I	§68 II
Filed	21621	772	1		75	20773	17425	3348
Settled	20823	741	1		70	20011	16927	3084
Unconstitutional <sup>2)</sup>	445 <311> <sup>7)</sup>	221 <202>				224 <108>	68 <55>	156 <54>
Unconformable to constitution <sup>3)</sup>	141 <106>	54 <40>				87 <66>	31 <33>	56 <33>
Unconstitutional, in certain context <sup>4)</sup>	59 <43>	15 <9>				44 <34>	17 <13>	27 <21>
Decided by Full Bench	28 <29>	7 <14>				21 <15>		21 <15>
Constitutional	1569	269				1300	4	1296
Annulled <sup>6)</sup>	379				16	363	363	
Rejected	6124		1		17	6106	6106	
Dismissed	11391 <9856>	59			26	11036 <9856>	9844 <8598>	1462 <1258>
Miscellaneous	6					6	5	1
Withdrawn	681	116			11	554	489	65
Pending	798	31			5	762	498	264

- 1) This type of “Constitutionality of Law” case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.
- 2) “Unconstitutional” : Used in Constitutionality of Laws cases.
- 3) “Unconformable to Constitution” : This conclusion means the Court acknowledges a law’s unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.
- 4) “Unconstitutional, in certain context” : In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.
- 5) “Constitutional, in certain context” : This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of “Unconstitutional, in certain context.” Both are regarded as decisions of “partially unconstitutional.”
- 6) “Annulled” : This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.
- 7) The numbers in < > represent the numbers of statutory provisions subject to the review.

## ■ Explanation of Abbreviations & Codes

**KCCR** : Korean Constitutional Court Report

**KCCG** : Korean Constitutional Court Gazette

## ■ Case Codes

- **Hun-Ka** : constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act
- **Hun-Ba** : constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68, Section 2 of the Constitutional Court Act
- **Hun-Ma** : constitutional complaint case filed by individual complainant(s) according to Article 68 Section 1 of the Constitutional Court Act
- **Hun-Na** : impeachment case submitted by the National Assembly against certain high-ranking public officials according to Article 48 of the Constitutional Court Act
- **Hun-Ra** : case involving dispute regarding the competence of governmental agencies filed according to Article 61 of the Constitutional Court Act
- **Hun-Sa** : various motions (such as motion for appointment of state-appointed counsel, motion for preliminary injunction, motion for recusal, etc.)

\* For example, “96 Hun-Ka 2” means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

